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DEVELOPMENT OF RIGHT TO PRIVACY IN INDIA: A CRITICAL ANALYSIS

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*"No person shall be deprived of his life or personal liberty except according to procedure established by law"*¹

This right has been held to be the heart of the Indian Constitution, the most organic and progressive one in our living Constitution, the foundation head of our laws.² The Oxford English Dictionary defines a right as a justifiable claim on legal or moral grounds to have or to obtain something, to act in a certain way. Rights are of essential importance in such disciplines as law and ethics. Right is an interest recognized and protected by law. 'Rights' are legal, social, or ethical principles of freedom or entitlement; that is, rights are the mental normative rules about what is allowed of people or owed to people. Rights are often considered in the context of civilization, being regarded as established pillars of society and culture and the history of social norms can be found in the history of each right and its development. The specific enumeration of rights has varied greatly in different periods of history. In many cases, the system of rights promulgated by one group came into sharp and bitter conflict with that of other groups.³ The law dictionary⁴ defines right as a claim on any subject matter whatsoever. The term life means the state of being alive as a human; an individual person's existence. The law dictionary⁵ denotes life as a life of a human being unless a contrary appears from the context. Therefore the term right to life may simply mean the right of an individual to stay alive.

The liberal interpretation of the constitution in the welfare state of India has expanded the meaning of the right to life by including in its ambit the simplest of the right from right to clean environment to the complicated like right to privacy.

The digital India is a very pleasing thought, but it does come with certain drawbacks. The most important fundamental right of our, the right to privacy is compromised. At present India does not have any law for right to privacy and data protection but only a judgment that recognizes it as a fundamental right.

The data privacy breach generally comes in a loop. Firstly the customers subscribe or provide certain information to an institution in good faith to get services or product. Then the institution's security is breached and in turn the people have to compromise their right. Then the investigation takes place and the breached person gets to file a criminal suit against the accused and the matter is then presented to the court.

There is no remedy to person whose privacy is breached when essentially according to the constitution the remedy for violation of fundamental right is a petition under Art 32 or Art 226 to the Supreme Court and Art 226 respectively. What is more dangerous is that the person does not know the right is breached unless he is notified of the same. Many times he might not know it at all. All the breaches of fundamental rights are up to the government while this one is unforthcoming and uncandid.

Further the right to privacy is directly connected to democracy. It can be said so because a democratic government is for the people, by the people and of the people. The four pillars of the state include the public as well as the private. Therefore, if the public is not protected adequately, the state has failed to be a complete democracy. Democracy means physical as well as mental. Thus when India claims to be the largest democracy in the world, it is necessary for it to protect its public.

International scenario-

The United States of America does not have the privacy provision in its Constitution. However through the exercise of judicial activism the judges were able to insert this right into it. The amendments to the constitution were made to determine this right.

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CONSTITUTION OF INDIA, ART. 21.

OELHO V. STATE OF TAMIL NADU, AIR 2007 SC 861.

DRA KUMAR AND PREETI MISHRA, "RIGHT TO EDUCATION: A CRITICAL EVALUATION OF THE RIGHT OF CHILDREN TO FREE AND COMPULSORY EDUCATION ACT 2009 IN THE LIGHT OF 4A'S FRAMEWORK, BLR (APRIL- JUNE) & 180 (2016).

MANATHA AIYAR'S LAW DICTIONARY 2012

The earlier amendments like the third and fifth amendment provide certain freedoms which in turn give autonomy to the citizens. The amendment number fourteen which is very similar to Art 21 of the Constitution speaks about right to privacy directly. It is the right to life, liberty and property. The Privacy Act of 1974 prevents unauthorized disclosure of personal information held by the government. A person has the right to review their own personal information, ask for corrections and be informed of any disclosures.

The Financial Monetization Act of 1999 requires financial institutions to provide customers with a policy that explains what kind of information is being collected and how it is being used. Financial institutions are also required to have safeguards that protect the information they collect from customers.

The United Kingdom Constitution is not a written document. It is made up of several acts of Parliament such as The Magna Carta, The Bill of Rights, and The Parliament Act etc. In the United Kingdom Parliament is supreme. The Parliament has enacted the Human Rights Act. Art 8 of the Act says that "Everyone has the right to respect for his private and family life, his home and his correspondence." The right to privacy protects you against the intrusion of personal life- including unnecessary, heavy handed state of surveillance. Your right to privacy can only be interfered when it is absolute necessary in a democratic society. The right to private life is based on human dignity and is linked to many other rights.

Historical Background of Right to privacy-

Human rights are universal and inherent rights that a man exists. Right to privacy is the most valuable of them. It cannot be compromised or suspended. It has several dimensions ranging from personal communication and personal data. The right is very important in a person's life and also plays a significant role in keeping its dignity.

The jurisprudential aspect of the right to privacy is based on the theory of rights and duties. Each right has an equal obligation. Thus bigger the right bigger will be the obligation. The whole system is based on correlation between rights and duties. To stop arbitrary rights one must question whether this right is necessary and how essential is it.

The right to privacy can also mean an idea of private space in which man may become and realize himself. The studies of animal behavior and social organization suggest that man's need for privacy may well be rooted in the animal origins. Privacy is one of the concepts which are closely related to human dignity there it begins with human race itself.

The concept of human rights is not alien to the Indian political thinkers and philosophers. They expressed concern to secure human rights and fundamental freedoms for all human beings everywhere since very early times of Vedic age.¹ India in the primitive times was a co-operative based society. The different groups of the society performed their own function as their roles were divided. The ancient India was almost a village and people had community lives, but they were masters of their own houses. The Dharmashastras show the existence of privacy; thus the king had to respect the right of privacy of their citizens.

Various Hindu mythology books talk about meditation and how the Rishis would spend days and years meditating in the Himalayas without being disturbed. This was in some way recognition of right to privacy. The right to privacy also includes the right to be left alone. A story in the mythology reveals that when Lord Shiva was meditating, he was disturbed by Kamdeva who was later burnt as a punishment by Lord Shiva with his third eye.

The Rigveda which is the oldest of the Vedas says that one ought to build such house which can sustain and protect the inmates in all seasons and be comfortable. The passers-by may not see the inmates and the inmates see them.

There are certain instances of privacy in Ramayana as well. The fact that the queens each lived in their own quarters and only the king who was their husband could meet them without permission was the sign of acceptance of the right to privacy. The other had to take the necessary permission from the queen.

Also there is an incident in the Ramayana when we can see traces of the right to privacy is when Mandodri the queen of Ravana upon his death came to the battle field unveiled and asked him to get up and scold her for doing so. This incident showed that women would keep themselves veiled and only their husbands could see them without permission.

This can be further proved when Lord Rama showed his disapproval towards his wife Sita after she had been in the custody of Ravana. She had to go through Agni Pariksha to prove her loyalty and purity. Right to privacy of a married couple was violated in that scenario.

Similar views were shared in the Mahabharata wherein the women were made to put a veil and could not be touched by anyone except their husbands. As we know that Draupadi was shared between the

¹M.V. Pylee, Select Constitutions of the World" (Lexis Nexis, Haryana, Fourth Edition).

²Irshad Ahmad Hurrar, "Human Rights in India- A Historical Perspective". Volume 6 Issue 1 *International Research Journal of Engineering and Technology* (2019) ISSN 2395-0056.

andava brothers, however it was decided that every brother would spend an entire year with her. During this time others were not to disturb the couple and would respect their privacy. However on one such unfortunate event Arjun entered the room while Draupadi was with Yudhishtira and was punished as he had violated their privacy. He was banished for 12 years in the forest.¹

In the Yajñawalkya Samhita it is conceptualized that whatever has been given to a woman by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or given to her on her husband's marriage with another wife, is Stridhana.

Historical evidence shows that the right was prevailing in all situations in some way or the other. Manusmriti which is a great ancient Indian text says what was given before the nuptial fire, what was given on the bridal procession, what was given in token of love, and what was received from her brother, mother, or father, that is called the six fold property of a woman.

Consequently, a woman's husband or his families were precluded from using her Stridhana, unless they were in dire straits. Additionally it was a sin for a woman's relatives to use her wealth even if the same was done unknowingly.

Further it also says that a person was not to be disturbed while meditating. It also mentions that if a person talks to an unknown woman in a lonely place he will be fined one thousand panas.

The great Chanakya wrote the Kautaliya's Arthashastra during the Mauryan Empire. He mentions that ministers were to be conversed to in private. He believed that it would help maintain the secrecy of state policies. The Arthashastra has also laid down a detailed procedure for consulting the ministers so as to ward off the possibility of leakage of state policies.

This was also the time when a lot of spies were used, whether they were to gauge people's reaction to a certain policy made by the king or to collect information about the other kingdoms. Chanakya did not encourage eavesdropping, instead he encouraged them to join in on debates to understand the view point of the general public.

As were the recognition of right in the Arthashastra there was a huge violation too. The Arthashastra directed the people how their houses should be designed and anybody making a house not according to the design was punished.

The Islamic law is comparatively stricter than the Hindu law. The Muslims follow the Shariah which can also be called as the god's command. The Islamic law also protected privacy of a home as a fundamental right. It said that a home was a sanctuary for the people residing in it.

The holy Quran which is the authoritative text in the Islamic law says that when one enters somebody else's house they must announce that they are coming in. Nobody could just walk in casually without permission.

The principles of Islam are based on Haya or shyness. It is believed that if a man were to commit a wrong by letting his animal instincts rule, the Haya would pull them towards conscience. In this aspect the holy Quran says that the men and women were not allowed to look at the opposite gender who was not their spouses. The privacy principle was so far stretched that it covered within its ambit the process of search and seizure. Even reading letters of someone else without their permission was to take a person to hell. The most important thing that the Islamic law began to realize was freedom to express one's opinion and have intellectual liberties.

Caliph Umar who was one of the most powerful Caliphs once overheard a man singing. It spiked his interest and he peeped inside the man's house. He saw some wine and a woman inside the house. When the man was tried in court, the Caliph was reminded that punishing him would mean violating his right to privacy. The man was set free with a promise that he would lead a good life henceforth. This incident proves that state had an obligation towards their citizen to maintain their right to privacy.

However when the right interfered with the health, public safety, rights and privileges of others the right could be restricted.

By the 19th century the right to privacy had already been recognized in the United States and in the United Kingdom however not so much in India directly. Laws like Evidence Act, Easement Act had provisions that would accept the right indirectly. There was no concrete definition of what the right meant and there still isn't. Thus we can say that there was a custom of privacy in the ancient Indian texts.

Judicial response for Development of Right to Privacy-

The case before Allahabad High Court of *Gokul Prasad v. Radho*² held that right to privacy existed as a usage and custom in these provinces and substantial interference without consent can give rise to a cause of action. The issue was construction of verandah and certain doors overlooking the plaintiff's house where the

Ravinder Kumar and Gaurav Goyal, The right to privacy in India concept and evolution. (Partridge Publishing, 2016)
SBN 978-1-4828-6865-4.
(1888) ILR 10 All 358

pardashin women of his house stayed. The high court restored the lower court's order which had agreed to plaintiff's claim with costs.

A similar case was also brought up before the Bombay High Court in *Manishankar Hargovan v. Trikarnarsi*¹. The Court decreed the closing of doors and windows of defendants' newly constructed house which had the view of plaintiff's apartment depriving him of his right to privacy.

Most legal conceptions of privacy in everyday use in India also have the base in the English common law. Other constitutional and statutory constructions of privacy, even when not found in the common law, arose in a system of law and justice that originated in Europe. During the European colonization of India, the British attempted to recreate the common law in India through the establishment of a new legal and courts system.

The constituent assembly debate² Volume VII discussed about Art 14(4) which read as under

(4) *The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.*"

This amendment was made keeping in mind the American Constitution's Fourth Amendment and also provision from the Irish Constitution. There was an inspiration from Dr. Ambedkar's book as well. It was also suggested so as to bring about some structure in the Criminal law wherein arrests were made without warrant and searches without justification.

During the voting, neither an acceptability nor complete rejection of the amendment was reached. The voting was thus postponed.

Privacy is not a fundamental right was first held by the Hon'ble Supreme Court in the year 1954. In *M.P. Sharma v. Satish Chandra*³, the Court dismissed the existence of a right to privacy on the basis that the makers of Constitution had not envisaged a fundamental right to privacy. The issue was regarding the violation of fundamental rights under Articles 19(1)(f) and 20(3) of the Constitution. The Court said that the Constitution did not have a language similar to the Fourth Amendment to the U.S. Constitution.

*Kharak Singh v. The State of U.P.*⁴ was decided in 1964. Kharak Singh was arrested for dacoity but was later released due to lack of evidence. The police brought him under surveillance. The question for consideration in this case was whether "surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution.

Regulation 236(b) which permitted surveillance by "domiciliary visits at night" was held to violate of Article 21. The meanings of the word "life" and the expression "personal liberty" in Article 21 was elaborately considered in this case.

Although the majority found that the Constitution contained no explicit guarantee of a "right to privacy" it read the right to personal liberty expansively to include a right to dignity. It held that "an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man - an ultimate essential of ordered liberty, if not of the very concept of civilization".

In a minority judgment in this case, Justice Subba Rao held that "the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle" "it is his rampart against encroachment on his personal liberty." This case, especially Justice Subba Rao's observations, paved the way for later elaborations on the right to privacy using Article 21.

In *Govind v. State of Madhya Pradesh*⁵, decided by a three Judge Bench of the Supreme Court, is regarded as being a setback to the right to privacy jurisprudence. Here, the court was evaluating the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided for police surveillance of habitual offenders which including domiciliary visits and picketing of the suspects. The Supreme Court desisted from striking down these invasive provisions holding that, "It cannot be said that surveillance by domiciliary visit would always be an unreasonable restriction upon the right of privacy. It is only persons who are suspected to be habitual criminals and those who are determined to lead criminal lives that are subjected to surveillance. Thus this case accepted the right in part.

¹ 5 Bom. H.C.R. 42

² https://www.constitutionofindia.net/constitution_assembly_debates/volume/7/19481203?paragraph_number=12%2C106%2C105%2C13%2C11%2C14%2C10#7.66.12 last visited on 28th February 2020.

³ AIR 1954 SC

⁴ AIR 1963 SC

⁵ AIR 1975 SC.

On, 24th July 2017 a judgment was passed which has changed the outlook towards right to privacy forever. It not only gave the right its full recognition but it also declared it a fundamental right. The nine judge bench passed an affirming judgment in the case Justice K.S Puttaswamy v. Union of India.¹ The Supreme Court has, however, clarified that like most other fundamental rights, the right to privacy is not an "absolute right". Subject to the satisfaction of certain tests and benchmarks, a person's privacy interests can be overridden by competing state and individual interests.

The question of whether or not privacy is a fundamental right first arose in 2015 before a three-judge bench of the Supreme Court considering the constitutional challenge to the Aadhaar framework. The Attorney General had then argued that although a number of Supreme Court decisions had recognized the right to privacy, Part III of the Constitution does not guarantee such a fundamental right since larger benches of the Court in M.P.Sharma (8 judge bench) and Kharak Singh (6 judge bench), had refused to accept that the right to privacy was constitutionally protected.

The judgment provides a good overview by highlighting the need for different reasonableness for different fundamental rights. He believed that the intrusion in privacy should be according to the principles of Art 21 that is just, fair and reasonable. He then also says that there will be a tighter scrutiny when there is matter of compelling state interest involved. This should have a test which is greater than just, fair and reasonableness. It should have a higher level of importance in terms of government's interest in privacy intrusion. However he has failed to mention what will be in this special category and is left for the courts to decide in the future.

Thus, the judgment is essentially trying to say that right to privacy is a fundamental right. However as no fundamental right is absolute, this right also has certain restrictions. When the state needs to put in effect these restrictions then they should be based on the following-

- a) There is a law in existence that puts such restrictions.
- b) The law should be enacted for a legitimate aim of the state. It should be necessary for the democratic society.
- c) There should be direct nexus between the aim and the procedure adopted to achieve them.

Suggestions & Conclusion-

The need for privacy and its recognition as a right is the product of an increasingly individualistic society in which the focus has shifted from society to the individual. Earlier, the law afforded protection only against physical interference with a person or his property. As civilization progressed, the personal, intellectual and spiritual facets of the human personality gained recognition and the scope of the law expanded to give protection to these needs.

With the recognition of privacy as a basic and fundamental right of an individual, India definitely cannot lag behind. The judgment of the Supreme Court is correct and true and with the growing information technology, privacy needs to be fundamental right. However, it is also true that stringent laws needs introduction after this. An expert committee must be formed to probe into the matter as to how many privacy infringement issues are taking place in India and accordingly legislation exclusively dealing with such problems must be enacted. Data protection laws must be made more stringent and must conform to OECD guidelines.

Only one or two sections like section 43A of the IT Act won't be sufficient to regulate the data protection at such a large scale when schemes like Aadhar are to be implemented.

Suggestions-

Protection from Citizen's Identity Theft- A separate legislation regarding right to privacy should be made so as to provide protection from the theft of citizen's identity whether it may be theft of personal identity or financial identity which may take account of criminal identity theft and financial identity theft. **Prohibition of interception of communications-** There may be prohibition of interception of communications except in certain cases but only with the approval of Secretary-level officer.

Constitution of a Central Communication Interception Review Committee- A Central Communication Interception Review Committee may be constituted to examine and review the interception orders passed by the concerned authority. **Imposition of Penalty-** Penalty should be imposed upon such person who tries to obtain any information from any resource or any officer of government under any pretext.



¹WRIT PETITION (CIVIL) NO. 494 OF 2012.